

**ORIGINAL**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA**

**FILED**

**04 JAN 26 PM 12:12**

**U.S. DISTRICT COURT  
N.D. OF ALABAMA**

**UNITED STATES OF AMERICA,**

**v.**

**RICHARD M. SCRUSHY,**

**Defendant.**

**CR-03-BE-0530-S**

**MOTION OF DEFENDANT RICHARD M. SCRUSHY TO  
COMPEL COMPLIANCE WITH RULE 16(a)(1)(E)(ii)**

(Authorities Included)

Defendant Richard M. Scrushy ("Defendant" or "Mr. Scrushy") respectfully submits this Motion to Compel Compliance with Rule 16(a)(1)(E)(ii).

1. Rule 16(a)(1)(E) requires the government to provide discovery with respect to certain documents and objects. In particular, subsection (ii) of that rule requires discovery of those items "the government intends to use. . . in its case-in-chief at trial."

2. Here, the government has provided defense counsel with copies of several hundred thousand pages of documents along with hundreds of CD Roms, computer hard drives and magnetic tapes, and dozens of audio and video tapes in response to Mr. Scrushy's requests for discovery. Additional production of documents and electronic media is forthcoming.

While the production of these documents is certainly required, the government has failed to identify which documents in that massive collection are those it "intends to use. . . in its case-in-chief at trial." This is particularly important because the government has also stated that it has downloaded the entirety of the HealthSouth server which, if printed, would exceed the

height of the Empire State building.

3. The government's failure to comply with its obligations substantially hinders the defense in preparing for trial. This is a complicated and time-consuming case. Being left to speculate as to which of the approximately one million documents (in hard copy and electronic form) produced by the government will ultimately be part of the government's case-in-chief, the defense will be forced to waste time preparing to meet evidence that may or may not be presented at trial, and may fail to prepare for that which is most important.

4. Also, the defense cannot comply with its reciprocal discovery obligation unless the government identifies the items it intends to use in its case-in-chief at trial. Currently, Mr. Scrushy's reciprocal discovery obligations are due on February 9, 2004, two and a half weeks after the government was supposed to satisfy (although it has not) its discovery obligations. See Scheduling Order dated December 30, 2003. This schedule was designed to allow the defense to learn about the government's case before being required to identify the items "the defendant intends to use . . . in the defendant's case-in-chief at trial" under the reciprocal discovery provision of Rule 16(b)(1)(A)(ii). The defense cannot satisfy its obligation to specify the items it intends to use unless it has some idea which of the million pages of documents the government intends to use.

5. The case law indicates that Rule 16(a)(1)(B)(ii) requires more than providing access to a large number of documents and leaving defense counsel to guess which ones the government intends to use at trial. See United States v. Poindexter, 727 F.Supp. 1470, 1484 (D.D.C.1989) (a party may not take a "broad brush approach" to discovery, identifying "several thousand pages, any of which it 'may' rely on at trial"); United States v. Turkish, 458 F.Supp. 874, 882 (S.D.N.Y.1978) (government may not "bury[ ] the defendant in paper" by merely ...

making all of the documents available...”); United States v. Upton, 856 F.Supp. 727, 747-748 (EDNY 1994), and cases cited therein. See also United States v. Hsia, 2000 WL 19067 (D.D.C. Jan. 21, 2000) (“Nor does the defendant satisfy her obligations under the Rule merely by providing the government with the thousands of pages of discovery she received from the government and stating that the documents upon which she intends to rely are found somewhere therein.”). As the Court said in Poindexter:

While the government’s case or strategy may change in advance of trial or even during trial, there is no reason why it cannot be more specific as to which documents it currently intends to use, and there are many reasons, grounded in fairness to the defendant, the protection of his rights, and not least Rule 16(a)(1)(C), why it should be.

Poindexter, 727 F.Supp. at 1484.<sup>1</sup>

6. While the government may certainly supplement any production made in connection with its Rule 16(a)(1)(E)(ii) obligations as it refines its theories and develops the evidence that it will ultimately use at trial, the government cannot use indecisiveness regarding trial strategy as an excuse to circumvent those obligations now. See Poindexter, 727 F.Supp. at 1484 (“This notification will not prevent the government from later introducing other documents from these materials on a limited scale, but it will give the defendant some notice as to which among the thousands of documents are likely to be part of the government’s case-in-chief.”).

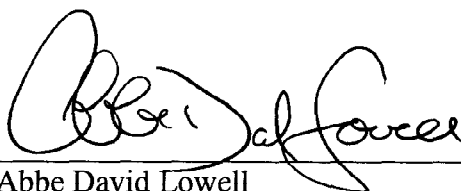
7. Absent the government’s compliance with its Rule 16(a)(1)(E)(ii) obligations, discovery would be meaningless in a complicated case such as this with massive quantities of documents. The government could simply produce millions of documents and leave the defense

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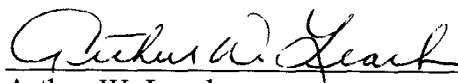
<sup>1</sup> Rule 16(a)(1)(C) at the time of Poindexter is equivalent to the current 16(a)(1)(E)(ii).

to guess which ones were meaningful to the case, as in Poindexter, and the defense could simply refer back to that mass of documents when it provided reciprocal discovery, as in Hsia. The parties might not know much more than they knew before discovery commenced. But as the courts in those cases said, the discovery rule requires more of both sides. While the defense here is not asking for a final trial exhibit list, Rule 16 does impose an early obligation on both parties to identify — to quote both Rule 16(a)(1)(E)(ii) and (b)(1)(A)(ii) — the items “it intends to use” in its case-in-chief. Accordingly, the government should be ordered to comply with Rule 16(a)(1)(E)(ii) within seven days. Mr. Scrushy’s obligation to provide reciprocal discovery should be adjourned until fourteen days after the government has complied with this obligation.

Dated: January 26, 2004



Abbe David Lowell  
Thomas V. Sjoblom  
Scott S. Balber  
Chadbourn & Parke LLP  
1200 New Hampshire Avenue, N.W.  
Washington, DC 20036



Arthur W. Leach  
c/o Thomas, Means, Gillis & Shay, P.C.  
505 20th Street North  
Birmingham, Alabama 35237


Attorneys for Defendant  
Richard M. Scrushy

**CERTIFICATE OF SERVICE**

I hereby certify that on January 26, 2004, a copy of the foregoing Richard M. Scrushy's Motion of Defendant Richard M. Scrushy to Compel Compliance with Rule 16(a)(1)(E)(ii) was served by facsimile and overnight mail to:

Alice Martin, Esquire  
United States Attorney for the  
Northern District of Alabama  
U.S. Department of Justice  
1801 4th Avenue North  
Birmingham, Alabama 35203

Richard C. Smith, Esquire  
Deputy Chief  
Fraud Section  
U.S. Department of Justice  
10th and Constitution Avenue, N.W.  
Washington, D.C. 20530

  
Julie A. Campbell  
Chadbourne & Parke, LLP  
1200 New Hampshire, Ave. NW  
Washington, D.C. 20036  
(202) 974-5600